HSBC BANK MALAYSIA BHD

v.

ASIA TRANSPORT SERVICE (M) SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
RK NATHAN J
[ORIGINATING SUMMONS NO: S2-24-1909-1999]
9 OCTOBER 2000

LAND LAW: *Restraints on dealings - Caveat - Removal - Failure to delete appropriate word in Form 19B whether caveat to bind land or merely interest in it - Statutory declaration in support disclosing no caveatable interest - Validity of charge over land not disputed - Lack of timeous action - Whether application for removal of caveat should be granted*

The plaintiff had granted banking facilities to the defendant which was secured by a third party charge over a piece of land ('the land'). The third party was the owner of the land. Some 12 years after the creation of the charge, the defendant entered a private caveat on the land claiming to be its beneficial owner and alleging that the third party was its trustee. However, nowhere in the land title was the third party described as a trustee. Upon the default of the defendant under the banking facilities, the plaintiff commenced foreclosure proceedings in respect of the land culminating in an order for sale. This was the plaintiff's application under s. 327(1) of the National Land Code ('NLC') for the removal of the caveat entered by the defendant.

Held:

[1] The defendant had not made the appropriate deletion in Form 19B pursuant to s. 322(b) NLC, whether the caveat was to bind the land itself or merely a particular interest in the land. On that ground alone, the caveat must be removed.

[2] The statutory declaration in support of Form 19B did not disclose the basis of the creation of the trust. There was just a mere assertion that the defendant acquired the land and registered it in the name of the third party. Such bare assertions were insufficient. Further, the defendant had failed to explain the conspicuous failure to state in the land title that the third party was a trustee pursuant to s. 344(1) NLC.

[3] The charge in favour of the plaintiff was executed by one Tee Ah Kee on behalf of the third party. The same person also executed the statutory declaration on behalf of the defendant to enter the caveat. Thus, it was clear that the defendant knew or ought to have known the legal consequences attendant to the creation of a charge. It was not open to

the defendant to insist on the continuation of the caveat which had a detrimental effect on the rights of the plaintiff to proceed with the judicial sale.

[4] The defendant, in another civil action brought by the plaintiff against the defendant, pleaded that the plaintiff should first proceed to foreclose on the land and not bring the action to recover the amount outstanding under the banking facilities granted to it. That inconsistent conduct of the defendant had again not been explained. Thus, the defendant's conduct was clearly unconscionable and an abuse of the process of the court.

[5] The plaintiff had a registered interest which clearly prevailed over the defendant's unregistered interest. Also, there was nothing in the evidence of the defendant disputing the validity of the charge.

[6] Almost four years after entering the private caveat, the defendant filed a civil suit against the third party. The defendant must act timeously. A lapse of four years was unacceptable especially when there was no explanation for the delay.

[Caveat to be removed, damages to be assessed by senior assistant registrar with costs.]

Case(s) referred to:
Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng & Anor [1995] 3 CLJ 520 ***(refd)***
Malayan United Finance Berhad v. Tay Lay Soon [1991] 2 CLJ 899 ***(foll)***
Registrar of Titles, Johore v. Temenggong Securities Ltd [1976] 2 MLJ 44 ***(refd)***
Soon Seng Co Sdn Bhd v. Toko Palayakat Jamal (M) Sdn Bhd [1999] 6 CLJ 397 ***(refd)***

Legislation referred to:
National Land Code, ss. 322(1)(a), (b), (2), (3)(a), 327(1)

For the plaintiff - Benjamin John Dawson; M/s Nik Hussain & Partners
For the defendant - Maidzuara Mohammed (Haslinda Md Hashim with him); M/s Logan Sabapathy & Co

Reported by Usha Thiagarajah

JUDGMENT

RK Nathan J:

Facts

The plaintiff had granted banking facilities to the defendant. The said banking facilities were renewed from time to time and were secured by a third party charge dated 3 June 1982 over land held under Lot 2785 HS(D) 10750 Negeri

Sembilan (the said land). The third party who is the owner of the land is Tee Hup Seng Holdings Sdn Bhd (the proprietor). On 18 October 1994, some 12 years after the creation of the charge, the defendant caused to be entered a private caveat on the register document of title, claiming to be the beneficial owner of the land and alleging that the proprietor is its trustee. However, nowhere in the land title is the proprietor described as a trustee. Upon the default of the defendant/borrower under the banking facilities, the plaintiff commenced foreclosure proceedings by way of Originating Summons No. 24-189-98 against the proprietor, culminating in an order for sale issued on 4 January 1999.

This is the plaintiff's application under s. 327(1) of the National Land Code (the NLC) for the removal of the private caveat lodged by the defendant.

Findings Of The Court

Section 322(3)(a) of the NLC states that the legal rights of the plaintiff, the chargee herein, who has obtained an order for sale, will be affected by the private caveat which prohibits the registration of any certificate of sale. In *Soon Seng Co Sdn Bhd v. Toko Palayakat Jamal (M) Sdn Bhd* [1999] 6 CLJ 397 I summarised the duty of this court as laid out by the Court of Appeal in *Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng & Anor* [1995] 3 CLJ 520 when considering a case of this kind. This is what I said at p. 401:

> The Privy Council through *Eng Mee Yong* decided that once an applicant has shown that he is an aggrieved party, it is the caveator's duty then to prove that he has a caveatable interest. In *Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng & Anor* [1995] 1 MLJ 719, the Court of Appeal set three stages for this court to consider before ordering the removal of a caveat. First, the court is to examine the caveat itself, that is, to look into Form 19B and the reasons stated therein for imposing the caveat. If no caveatable interest has been shown, the caveat ought to be removed without the need to consider the remaining two stages. If Form 19B shows a caveatable interest, the court then moves on to the second stage. The second stage is when an aggrieved party applies to remove the caveat. The court then examines the affidavit evidence of the caveator to find out if the evidence supports the caveatable interest claimed in the Form 19B or shows that the claim to a caveatable interest raises a serious issue to be tried. The court is to examine the evidence in detail and closely. If the evidence does not support the claim to a caveatable interest or that there is a serious issue to be tried on this point, the court is to remove the caveat without going to the third stage. Once the first two stages are satisfied, then the court must decide as a third stage, where the balance of convenience lies. It must be noted that at the second stage the caveator is not allowed to justify the retention of the caveat on a ground different from that set out in his Form 19B and the court is required to subject the caveator's affidavit evidence in support of the caveatable interest, to 'meticulous scrutiny'

(see *Goh Paik Swan v. Ng Choo Lum* [1996] 3 MLJ 437). In *Murugappa Chettiar Lakshmanan v. Lee Teck Mook* [1995] 1 MLJ 782, the Court of Appeal held that the caveator must show an enforceable contract to have a caveatable interest. In *Wu Shu Chen*, the caveat was removed because the caveator had merely stated in the Form 19B that they had a caveatable interest 'by virtue of certain document' which they did not exhibit. Mokhtar Sidin JCA said at p 503:

> As can be seen in the said para 2 above, Goh had not disclosed what that so-called 'certain document' was. He chose to hide it from the world at large and it was as good as having nothing at all to show the caveatable interest he or Mingshu Syndicate claimed. He failed to disclose the instrument of trust in his caveat. Any person making a search on his caveat application form would have no notice of what the claim could be.

Considering the facts of the case before me, the defendant's Form 19B states in effect that the defendant purchased the said property from the administrator and paid RM55,000. That is all. The affidavit in reply opposing the application merely says:

> Since the defendant was in possession by reason of the matters abovestated, it entered into negotiations and concluded the sale and purchase agreement on terms and conditions. The contents of the agreement including the purchase price and terms etc are matters between the vendor and the purchaser and need not be disclosed to third parties including the plaintiff.

It is obvious that the defendant had deliberately set out not to reveal the terms and/or the purchase price of the said property and whether there exists any oral or written agreement. He merely states that he has paid $55,000 and there is no evidence what the balance of the purchase price is. As said by Mokhtar Sidin JCA in *Wu Shu Chen*, this Court is posed with the question whether the defendant has indeed something to hide. Was there indeed an agreement? Or if there indeed was a written agreement did it contain anything that would vitiate the agreement thus clearly showing a non-caveatable interest. On the other hand, no satisfactory explanation has been given why the balance of the purchase price has not been stated. Or is this court to assume that the total purchase price was only RM55,000? If this be the case then surely something is amiss. Why is the administrator rejecting a sale that would bring in RM1,150,000 and proceeding to enforce a sale that would give the beneficiaries only RM55,000? The caveatable interest of the defendant is clearly suspect and in my view, the defendant has failed miserably the 'meticulous scrutiny' test propounded by the Court of Appeal in *Luggage Distributors*.

It has been necessary to cite this lengthy passage to avoid repetition of the principles. The first stage therefore is for me to consider if the Form 19B filed by the defendant is in order.

One glaring omission of the defendant that can be seen from the Form 19B is that the defendant had not made the appropriate deletion as is required under s. 322(1)(a) and (b) of the NLC. It is necessary to reproduce the said section which reads as follows:

322. Nature and effect of private caveats.

(1) A caveat under this section shall be known as a 'private caveat', and -

(a) may be entered by the Registrar on the register document of title to any land at the instance of any of the persons or bodies specified in section 323;

(b) shall have the effect specified in sub-section (2) or (3), according as it is expressed to bind the land itself or merely a particular interest therein:

Provided that such a caveat shall not be capable of being entered in respect of a part of the land.

(2) The effect of any private caveat expressed to bind the land itself shall, subject to sub-sections (4) and (5), be to prohibit so long as it continues in force the registration, endorsement or entry on the register document of title thereto of -

(a) any instrument of dealing executed by or on behalf of the proprietor thereof, and any certificate of sale relating thereto;

(b) any claim to the benefit of any tenancy exempt from registration granted by the said proprietor; and

(c) any lien-holder's caveat in respect thereof.

(3) The effect of any private caveat expressed to bind a particular interest only shall, subject to sub-sections (4) and (5), be to prohibit the registration, endorsement or entry on the register document of title of -

(a) any instrument of dealing directly affecting that interest (including any certificate of sale relating thereto); and

(b) where that interest is a lease or sub-lease -

(i) any claim to the benefit of any tenancy exempt from registration granted directly thereout, and

(ii) any lien-holder's caveat in respect thereof.

The Form 19B states as follows:

Dengan ini memohon supaya dimasukkan suatu kaveat ke dalam hakmilik tanah yang tersebut dalam jadual di bawah ini supaya menyatakan sebagai mengikut:

tanah itu sendiri/kepentingan yang tersebut dalam jadual itu.

In other words, it was imperative for the defendant to have stated in the Form 19B, by deleting either "sendiri" or "kepentingan yang tersebut dalam jadual itu", his intention that the caveat is to bind the land itself or merely a particular interest in the land. It must be borne in mind that the entry of a private caveat is an encroachment of the rights of the proprietor and those having a legal interest therein, such as a chargee. As was said by Gopal Sri Ram JCA in *Luggage Distributors* at p. 537, "for it is a serious matter to caveat a person's property, and unless a case is properly made out, a caveat ought not to be permitted to remain on the register a moment longer than is absolutely necessary". To my mind these words signify the need to impose a strict interpretation of the provision in question. Where the caveator fails to intimate in clear express terms whether the caveat is to bind the land itself or a particular interest in the land, the caveator will not be able to show whether he seeks the assistance or the effect of sub-s. (2) or (3) of s. 322. Where the caveator is unable to show this aspect, then it is clear that the effect (emphasis provided) that is sought, pursuant to sub-s. 322(1)(b) cannot be defined and in the circumstances the caveator has failed to satisfy the requirement of sub-s. (b). On this ground alone, this caveat must be removed.

Based on the guideline set by the Court of Appeal in *Luggage Distributors* there is no need for me to proceed to the second stage. However, for completeness I shall proceed to the second stage which is to see if there is a serious question to be tried, by examining the evidence to see if there is a caveatable interest. In other words to apply the "meticulous scrutiny test". On this ground too I find that the defendant has failed to discharge its obligations. The statutory declaration in support of Form 19B does not disclose the basis of the creation of the trust. Notably the court does not know as to whether there was an agreement in writing or otherwise between parties to create the trust. There is no evidence of the purpose of the trust, if any. There is also no evidence as to the trustee and there is also no evidence as to the beneficiaries of the trust. I find that there is just a mere assertion that the defendant acquired the land and that it was registered in the proprietor's name. As I said in *Soon Seng Co Sdn Bhd* such bare assertions are insufficient. No explanation has been given as to why following the normal course of events, the said land which was allegedly acquired by the defendant was not registered in its own name. Further, there is also no evidence in the statutory declaration how the defendant acquired the said land. In fact in an affidavit in support (encl. 9) a director of the defendant affirmed that one Tee Chin Yoong acquired the said land, whereas in the statutory declaration the defendant says it bought the land and registered it in the name of the proprietor. However, the defendant has failed to explain, both in the statutory declaration and in the affidavit, the conspicuous failure to state in the land title, that the proprietor is a trustee pursuant to s. 344(1) of the NLC.

Even if I were to consider the third test advocated by the Court of Appeal in *Luggage Distributors* and to apply the balance of convenience test, here again the defendant must fail.

This is a case where the defendant not only had full knowledge of the facts, but actually allowed the proprietor (the alleged trustee) to execute the charge in 1982 as a security for banking facilities granted to it. In a letter of offer issued by the plaintiff and accepted by the defendant it is a term that banking facilities granted are to be secured by a charge on the said land. Another interesting factor to note is that the charge in favour of the plaintiff was executed by one Tee Ah Kee on behalf of the proprietor. It is this same person who has also executed the statutory declaration on behalf of the defendant in order to enter the private caveat. To my mind it is clear that the defendant knew or at least ought to have known the legal consequences attendant to the creation of a charge *viz-a-viz* the legal obligations of a proprietor/chargor and the rights vested in the plaintiff/chargee.

It is my judgment therefore that it is not open to the defendant to insist on the continuation of the private caveat which has a direct detrimental effect on the rights of the plaintiff/chargee to proceed with a judicial sale.

It has also been pointed out by the plaintiff that in another civil action (Kuala Lumpur Sessions Court No. 52-4833-98) brought by the plaintiff against the defendant, Tee Ah Kee and 3 others, to recover the amount outstanding under the same banking facilities, the defendant pleaded in its defence (para. 8) that the plaintiff should first proceed to foreclose on the land and not bring the action to recover against them, for the defendant. This inconsistent conduct of the defendant has again not been explained which leads this court to conclude that the defendant's conduct is clearly unconscionable and in my view constitutes an abuse of the process of the court.

Another factor that I ought to consider and which factor favours the plaintiff is that the plaintiff has a registered interest which clearly in my view prevails over the defendant's unregistered interest. In *Malayan United Finance Berhad v. Tay Lay Soon* [1991] 2 CLJ 899 the then Supreme Court held that as the charge was registered first in time, it ranked in priority over the caveat lodged 15 years after the registration of the charge. I am of the same view. In any case there is nothing in the evidence of the defendant, disputing the validity of the charge.

Finally, it is also necessary to note that almost 4 years after entering the private caveat, the defendant has filed a civil suit D4-22-326-1998 in the Kuala Lumpur High Court against the proprietor. What is the nature of this suit has

not been stated. In *Registrar of Titles, Johore v. Temenggong Securities Ltd* [1976] 2 MLJ 44 Lord Diplock said at p. 46 as follows:

> The purpose of a private caveat is to preserve the *status quo* pending the taking of timeous steps by the applicant to enforce his claim to an interest in the land by proceedings in the courts.

It is clear from this that the caveator must act timeously. A lapse of 4 years before filing a suit after entering the caveat is unacceptable especially when no explanation for the delay has been proffered. In the circumstances, I granted an order for the removal of the said caveat and for damages to be assessed by the senior assistant registrar with costs.